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SUPREME COURT U.S.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 22.

RICHARD C. CRAWFORD AND EDWARD A. VALENTINE, PLAINTIFFS IN ERROR,

vs.

JOHN E. BURKE.

PETITION FOR REHEARING.

MARTIN CLARK,
C. J. WILLETT,
Counsel for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15763

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N ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Now comes the said defendant in error, by his counsel, d respectfully petitions this honorable court for a rehear- g of said cause, and in support of his petition begs leave present the reasons following:

This action was for fraud and for willful and mali- ous injuries to the plaintiff's reversionary interest property, and was not an action in trover for con- ersion.

The court has characterized and treated this action as an tion in *trover for conversion*.

We respectfully submit that neither as to the first five unts nor as to the last five counts in the declaration was

the action an action in trover, and that the reasoning of the court based upon the theory that the action was in trover for conversion cannot apply to this case.

By referring to the declaration, it will be seen that in each of the ten counts therein a separate and distinct cause of action is set out. In each of the first five counts *damages* are claimed by reason of the injuries willfully and fraudulently committed by the defendants to the plaintiff's *reversionary* interests in property. It was alleged in the declaration, and shown upon the trial, that the injuries to the plaintiff's reversionary interests were committed with *intent to cheat and defraud him*, and were therefore *willful and malicious*.

As to the last five counts in the declaration, the action was brought to recover damages for the *deceit* practiced upon the plaintiff by means of false and fraudulent representations, whereby the defendants obtained from him, at different times, sums of money amounting in the aggregate to the sum of $10,800.

Under the allegations in the first five counts, and upon the proofs adduced, an action in *trover* could not have been maintained. An action in trover will not lie unless the plaintiff was, at the time of the conversion, entitled to the immediate possession of the property converted. This is a well-established rule. It was neither alleged in the declaration, nor was it shown by the proofs, that the plaintiff had the *right of possession* of the stocks in controversy at the time they were converted by the defendants. On the contrary, it appeared from the declaration, and also from the evidence, that at the time the defendants sold the stock in controversy the plaintiff was *not* entitled to the possession of the stock, as the defendants were holding it as security for the balance due them thereon from the plaintiff. The plaintiff had simply a reversionary interest in the stock, and a conversion of that interest, either fraudulently or otherwise, would not have entitled the plaintiff to bring an action in *trover*. An action on the case for damages resulting from the defend-

ants' fraud, and from the willful and malicious injuries committed by them to the plaintiff's reversionary interests in the stocks, was the proper remedy, and not an action in trover for conversion.

We ask leave to cite—

1 Chitty Pl. (14th ed.), 134:

"For injuries to personal property not committed with force or not immediate, or where the plaintiff's right thereto is in *reversion*, case is the proper remedy."

Id., p. 139:

"For injuries to any personal property in *reversion*, trespass or *trover* cannot be supported; and case is the only remedy."

Id., p. 148*a*:

"If there be an outstanding special property in another, the general owner should sue in case for the injury to his *reversion*, not in *trover*, for the value of the goods."

In Pollock on Torts, star page 280, the author says:

"But an owner not entitled to immediate possession, might have a special action on the case, not being *trover*, for any permanent injury to his interest, though the wrongful act might also be a trespass, *conversion* or breach of contract, as against the immediate possessor."

Cooley on Torts (2d ed.), 521:

"In illustration of cases in which a showing of title is not sufficient, those may be instanced in which the owner has parted with the right of possession for a time, under some contract or lease or bailment. In such a case, if the term has not expired, or the bailment been terminated, at the time the conversion takes place, the owner cannot sue in *trover*, because, not having had the right of possession, his only injury is in his *reversionary* interest, and in suing for that he must count on the special case, and not on the conversion."

1 Saunders' Pl. and Ev. (5th Am. ed.), 715:

"An action on the case, though, in its most comprehensive signification, it includes an action of assumpsit, as well as an action arising on a tort, at the present time is only understood as meaning an action to a tort arising out of the special circumstances of the case. (See Chitty Pl., 123.) It lies in general, however, to recover damages for tort not committed with force, actual or implied, or having been occasioned by force where the property affected was not tangible, or the injury was not immediate, or consequential, or where the interest in the property was only in *reversion*. * * * And the party may recover damages for such injury, whether it be to the absolute or relative rights of persons, or to the personal or real property in possession or *reversion*, or to the real property, corporeal or incorporeal."

In Ayer *v.* Bartlett, 9 Pick., 156, a mill and machinery were leased by Ayer to one Schofield. During the term the machinery was attached as the property of Schofield. Ayer brought action against the sheriff. Declaration contained counts in trover and case. It was contended that the action would not lie. Putnam, J., delivering the opinion, said:

"We think that this objection is unfounded. If trover could not, we are satified that trespass upon the case could be maintained for such an injury to the reversionary interest in personal property. In Chitty Pl., 197, it is said that case is the proper remedy."

In the State courts the defendants took the position that as the plaintiff was not entitled to the possession of the stocks at the time they were sold by the defendants, the present action, which they insisted on calling an action in *trover*, could not be maintained.

They also endeavored to make it appear to this court that the trial court held that the action was in *trover* for conversion. Misled by an incorrect quotation in the brief of counsel for defendants, this court says, in the opinion, that the trial court found that the plaintiff "had a right to recover in trover."

The trial court made no findings which can be regarded except those embraced in the judgment and in the propositions of law submitted to it.

It was for this reason that the plaintiff was unable to raise in the supreme court of Illinois the question as to the proper measure of damages, as will appear from the opinion of the court.

The trial court found the defendants guilty upon all the counts in the declaration, and assessed the plaintiff's damages at $9,690.91 (Rec., 34). From the bill of exceptions taken in the trial court, it appears that at the time the judgment was rendered the court said:

"I have fully considered the numerous briefs in this case and have reached the conclusion that there was a conversion of what is termed the reversionary interest in this stock by the defendants in this case, and that, therefore, IF it was in trover, they had a right to recover, and that it is not such a debt as is barred by the bankruptcy act" (Rec., 245).

It has been repeatedly held by the supreme court of Illinois that remarks made by a trial court at the time it renders a judgment are entirely immaterial, as they are no part of the record. The judgment is. It is to that we must look. If the judgment is right, the reasons that may be assigned by the court for rendering it are of no consequence.

The judgment shows that defendants were found guilty upon each and all the counts in the declaration, and that damages were assessed upon each and all of the counts (Rec., 34). If one or more of the counts be sufficient to sustain the judgment, that is all that is required. The last five counts in the declaration and the evidence introduced at the trial show that the defendants obtained from the plaintiff, by means of false and fraudulent representations, the sum of $10,800.

The judgment rendered was only for the sum of $9,890.21. A judgment for a much larger sum should have been ren-

dered, and would have been rendered, had not the trial court adopted a wrong theory in the assessment of damages.

The court declined to decide an essential question in this case, namely: Were the claims made by the plaintiff in this action provable?

The first question presented to the court for decision was, whether the claims made by the plaintiff in this action were provable under the provisions of the bankruptcy act, but the court declined to decide that question, saying:

"Whether the effect of paragraph *b* is to cause an unliquidated claim which is susceptible of liquidation, but is not literally embraced by paragraph *a* to be provable in bankruptcy, we are not called upon to decide, as we are clear that the *debt* of the plaintiff was embraced within the provision of paragraph *a*, as one *founded upon an open account or upon a contract, express or implied*, and might have been proved under section 63*a* had the plaintiff chosen to waive the tort and take his place with the other creditors of the estate."

The court does not say that the *claims made by the plaintiff and involved in this case* were embraced within the provision of paragraph *a* "as claims founded upon an open account or upon a contract express or implied," and might have been proved under section 63*a*, but says "that the *debt* of the plaintiff" was so founded and might have been proved under section 63*a* "*had plaintiff chosen to waive the tort*"—that is to say, if the plaintiff had chosen to waive his claims for fraud and for willful and malicious injuries to his reversionary interests in the stock in controversy, and instead of seeking to recover in an action *ex delicto* the damages which he had sustained by reason of the fraud and willful and malicious injuries committed by the defendants he had made a claim based upon an open account or upon a contract express or implied, and would have been content with what he might be able to recover in an action in assumpsit, then the

claim or suit could be a debt "entitled within the provision of paragraph 4, as one founded upon an open account or upon a contract express or implied, and might have been proved under section 63a, had plaintiff chosen to waive the tort.

The court held that even the "debt" of which it spoke was provable on condition that plaintiff "waive the tort and rely his claim with the other creditors of the estate." "But as that condition was not complied with, as the plaintiff did not waive the tort, does it not follow that the "debt of the plaintiff" was not provable?

The question presented to this court [illegible] decision was not whether a "debt founded upon an open account, or upon a contract express or implied" was provable, because there could be no controversy upon that point, but the question was whether the plaintiff's claim for fraud and for willful and malicious injuries to his reversionary interests in property was provable under the provisions of section 63.

That was one of the federal questions involved in the case. A decision of that question in plaintiff's favor would have settled the case and an affirmance of the judgment would have necessarily followed.

We respectfully ask, Was not the plaintiff entitled to have the court examine and decide that question?

The plaintiff's claims for damages were founded upon the fraud perpetrated by the defendants and upon the willful and malicious injuries committed by them to his reversionary interests in property and were not provable in bankruptcy.

It is unquestionably true that the transactions had between the plaintiff and the defendants were of such a character that the plaintiff had an election to bring an action or action to recover the damages sustained by him by reason of the fraud and willful and malicious injuries to his reversionary

interests, or to waive the fraud and injuries and bring an action in assumpsit to recover a *debt* "founded upon an open account or upon a contract express or implied," but he could not do both.

In saying that "the debt of the plaintiff was embraced within the provision of paragraph *a* as one founded upon an open account or upon a contract express or implied," the court must necessarily have referred to the "debt" which the plaintiff might have recovered in an action in assumpsit, and which "might have been proved under section 63*a* *had the plaintiff chosen to waive the tort and take his place with the other creditors of the estate.*"

The court certainly could not have meant to be understood as saying that the plaintiff's claim for fraud "might have been proved under 63*a* had plaintiff chosen to waive the tort," for that would be equivalent to saying that he *would have to waive his claims for fraud in order to prove them.*

If the plaintiff's claims involved in this action were "founded upon an open account or upon a contract express or implied," they would, as a matter of course, have been provable under the express provisions of section 63*a*, but in that case the present action, which was an action *ex delicto*, could not have been maintained. An action on claims so founded would necessarily be an action in assumpsit, and the bringing of such an action would of itself have been a waiver of all claims founded upon tort.

The plaintiff sued in tort, and he must have recovered upon claims founded upon tort and not upon claims founded upon contract. The judgment which the plaintiff recovered in the present case is conclusive evidence that the claims upon which the action was based were claims founded upon tort and not upon contract.

If it can be said in a case involving the construction of the bankruptcy act that whenever a party has an election to sue on contract or sue in tort, if he sues in tort, his claims founded upon tort are claims founded upon contract, the

same may be said in all other cases. That would indeed be a novel doctrine.

We respectfully say that it is not possible that it was the intention of the court to hold that the plaintiff's claims for damages arising out of the defendants' positive fraud, and out of their willful and malicious injuries to his reversionary interests in property, and based wholly upon such fraud and injuries, were "debts originating" or "founded upon an open account or upon a contract express or implied."

Our views as to the absence of any intention on the part of the court to hold that the claims which the plaintiff made and which were involved in this action were "founded upon an account or upon a contract express or implied," find confirmation in the fact that the court in construing subdivision 4 of section 17 proceeded to consider and determine the question whether debts created or founded upon fraud, but which were not created by fraud committed in an official or fiduciary capacity within the meaning of the statute, were excepted under subdivision 4 from the operation of a discharge. It would have been wholly unnecessary for the court to have decided or even considered that question if the plaintiff's claims in this action were debts "founded upon an open account or upon a contract express or implied," because debts so founded are not only provable, under the provisions of section 63*a*, but they are clearly within the class of debts from which a bankrupt is released by virtue of his discharge.

In construing section 17, the court certainly would not treat the plaintiff's claims as *debts* created by or founded upon fraud, and then, in construing section 63, hold that the plaintiff's *claims for fraud* were "founded upon an open account or upon a contract express or implied."

In the opinion the court says:

"But it is strenuously insisted by the plaintiff that a claim for the conversion of personal property is not within the

scope of section 17, because it is not a 'provable debt' within the definition of section 63*a*."

It is true that in the course of his argument the plaintiff called the attention of the court to the fact that the provision of the act of 1867, allowing "unliquidated damages * * * on account of any goods or chattels wrongfully taken, converted or withheld," to be assessed and proved, was omitted from the act of 1898. It is also true that he drew the inference that the omission of such an important provision from the act of 1898 must mean the omission of the purpose with which the provision was inserted in the act of 1867. In support of his views upon that point he cited Watertown Carriage Co. *v.* Hall, 77 N. Y. Supp., 1028. What he said upon the point will be found in twelve or fifteen lines of his brief at page 14. That is the extent of his argument, that a claim for the conversion of personal property is not a provable debt. But it was not at all necessary for the plaintiff to make any argument whatever upon that point, for the simple reason that his action was not in trover for conversion, as we have already pointed out.

Continuing, the court says:

"Did the latter section (section 63) stand alone, there would be some ground for saying that a claim, though 'founded upon an open account, or upon a contract, express or implied' would not be a provable debt, if plaintiff elected to treat the conversion as fraudulent and sue in *trover*, though he might have chosen to waive the tort and bring an action for a balance due on account."

Whether the latter section (section 63) stands alone or "must be read in connection with section 17," we cannot see where there is any ground for saying that a claim "founded upon an open account or upon a contract express or implied," would not be a provable debt under section 63*a*.

A person whose property has been unlawfully converted by another has an election to do one of two things: either to

make a claim founded upon tort, or to make a claim founded upon contract. He cannot do both. If he elects to sue in assumpsit his claim must be founded upon contract. A claim so founded is, of course, provable. If he elects to sue in trover his claim must be founded upon tort. It certainly cannot be said that it is "founded upon an open account, or upon a contract express or implied."

The court refers to the ruling made in certain cases under the bankruptcy acts of 1841 and 1867 with regard to the operation of a discharge where the creditor has an election to sue in tort or in assumpsit (Williamson *v.* Dickens, 27 N. C., 259; Oliver *v.* Hughes, 8 Penn. St., 426; Bradner *v.* Strang, 89 N. Y., 299–307). But the case of Strang *v.* Bradner, 114 U. S., 555, 560, cited in plaintiff's brief at page 20, must have been overlooked by the court.

That case arose under the bankruptcy act of 1867, a copy of which will be found in plaintiff's brief at page 8.

The special business of the plaintiffs in that case was to purchase wool which they forwarded to defendants, as commission merchants, to sell on account. Plaintiffs, for the accommodation of defendants, often furnished them with promissory notes for the purpose of enabling them to carry on business. By false and fraudulent representations that certain notes given by plaintiffs in February had not been used, defendants obtained from plaintiffs in March a new set of notes. The action brought by plaintiffs was to recover *damages* for the *deceit* practiced upon them.

Mr. Justice Harlan, delivering the opinion of the court, said:

"The present suit, brought to recover a judgment for the amount plaintiffs were compelled to pay to *bona fide* holders of the March notes, proceeds upon the ground that the appellees have sustained damages by reason of the false and fraudulent representations made by Strang, on behalf of his firm, whereby the appellees were induced to execute and deliver to that firm the four notes dated March 1875. Is this claim for *damages* of a class from which the bankrupts

were relieved by their respective discharges in bankruptcy?"

* * * "That representation—as the jury in effect found—was made with the intent to deceive the plaintiffs in reference to the actual state of things, and to induce them to do what defendants knew they would not otherwise have done, or been asked to do. If Strang's conduct does not constitute positive fraud, or fraud in fact, involving intentional wrong, it is difficult to conceive what circumstances would have amounted to fraud of that character.

"It is contended, however, that as Strang and Holland Bros. were under a legal obligation, apart from any responsibility for the alleged fraudulent representations by Strang, to protect the plaintiffs against liability on the notes dated in March, the latter could have a claim against the estate of the several bankrupts for such amounts as they were compelled to pay on account of their being accommodation makers and endorsers; consequently, it is argued, the defendants are released, by their respective discharges in bankruptcy, from the present claim for damages. To this proposition there are two answers: 1. While the plaintiffs *might* have based their claim entirely upon the legal obligation of defendants to take up the notes at their respective maturities, they were not bound to waive their right to proceed against the defendants for *damages* on account of *fraud* in procuring their execution. This action is brought to recover *damages* for the *deceit* practiced upon the plaintiffs. The claim here asserted is not one from which the bankrupts are protected by their discharges, *for it is not a claim provable against their estates in bankruptcy* (Rev. Stat., secs. 5076–5072, inclusive, 5117, 5119). 2. But had the plaintiffs waived their right to claim damages specifically for the deceit practiced upon them and made a claim against the estate of the bankrupts based wholly on their legal obligation to save plaintiffs harmless on account of their being the makers and endorsers of the notes in question, or if the present action *had been based upon that obligation*, and not upon the *fraud* committed by defendants, it would not follow that the defendants would be protected by their discharges in bankruptcy."

* * * "It is therefore clear that whether the claim asserted by plaintiffs is regarded as one arising out of the *deceit* or *fraud* of the defendants, or as a *debt* created by fraud, the discharges in bankruptcy do not constitute a defense."

As to the last five counts in the declaration in this case, the action was brought to recover *damages* for the *deceit* practiced upon the plaintiff by the defendants in obtaining from him $10,800 by means of false and fraudulent representations, and can, in no respect, be distinguished in principle from Strang *v.* Bradner. In that case, as in this, property was obtained by the defendants by *fraud.* In that case, as in this, the plaintiff might have waived his right to make a claim for *damages* on account of *fraud*, and sued on contract to recover a *debt.* In that case, as in this, the defendants contended that, as the plaintiff might have made a claim against them founded upon a contract, express or implied, they were released by their respective discharges in bankruptcy from the plaintiff's claim for damages arising from fraud. In that case, as in this, the plaintiff elected to sue in tort, as he had a right to do, and *made a claim for damages based wholly upon the fraud* committed by the defendants. In that case, as in this, a discharge in bankruptcy was interposed as a defense. In that case, as in this, the first question presented to this court for decision was, whether the *claims* made by the plaintiff were provable in bankruptcy.

In that case the court held (1) that the plaintiff 's claim was "one arising out of the deceit or fraud of the defendants;" and (2) that a claim arising out of *deceit* or *fraud* was not provable in bankruptcy.

It is to be noted that the act of 1867 provided for the proof of "*debts* created by fraud," while the act of 1898 does not.

It may be asked why was it expressly provided in the act of 1867 that a debt created by fraud "may be proved" if the debt might have been proved under the act without any such express provision? Again: If it was the intention of Congress to make debts created by fraud provable under the act of 1898, why did Congress omit from that act the provision of the act of 1867 allowing such debts to be proved?

In the opinion in this case it is said "that a change in phraseology creates a presumption of a change in intent." Does not the omission from the act of 1898 of the provision of the act of 1867 allowing debts created by fraud to be proved create a stronger presumption of a change in intent than if there had been simply a change in phraseology?

As further evidence of a change of intention with reference to the proving of claims founded upon tort is the fact that Congress omitted from the act of 1898 the following provision, contained in the act of 1867:

"All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as *debts* to the amount of the value of the property so taken or withheld with interest."

It must be conceded that a claim for damages arising out of fraud which could not be proved under the provisions of the act of 1867 cannot be proved under the provisions of the act of 1898.

If the plaintiff's claim in Strang *v.* Bradner was a claim arising out of the deceit or fraud of the defendants, as this court held it was, it cannot be said that the claims made by the plaintiff in the last five counts in his declaration in this case are not claims arising out of the deceit or fraud of the defendants.

If a claim for damages *arises* out of deceit or fraud, it *originates* and is *founded* upon deceit or fraud.

It certainly cannot be said that a claim for damages arising out of deceit or fraud is a "*debt* originating upon an open account or upon a contract express or implied" without confounding a *claim* arising out of deceit or fraud with a debt founded upon contract.

The court, continuing, says:

"But we think that section 63*a* defining provable debts must be read in connection with section 17, limiting the opera-

tion of discharges in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to *judgments*, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity."

We respectfully ask, why must section 63*a*, defining provable debts, be read in connection with section 17? The reason assigned by the court is that in section 17 "the provable character of claims for fraud in general is recognized."

But the court did not base its decision that the "*debt* of the plaintiff" was provable upon any inference drawn from section 17 as to the provable character of "claims for fraud in general," but based it solely upon the ground that "the debt of the plaintiff was embraced within the provision of paragraph *a* as one founded upon an open account or upon a contract express or implied." If the plaintiff's claims in this action are not "claims for fraud," but are *debts* "founded upon an open account, or upon a contract express or implied," it is difficult to see why section 63*a* must be read in connection with section 17 in order to show that debts founded upon a contract express or implied are provable, as the later section provides in express terms for the proof of such debts.

The court does not hold that *unliquidated claims* created by or founded upon positive fraud, or upon willful and malicious injuries to reversionary interests in property, are provable under paragraph *a* of section 63; but whether such claims are provable under paragraph *b* the court says it is not called upon to decide. But we respectfully say that that very question was involved in this case, and was presented to the court for decision, and not the question whether debts founded upon an account or upon a contract were provable.

We respectfully ask, also, how or in what manner is the provable character of claims for frauds in general recognized in section 17?

The court says:

"By excepting from a discharge claims for frauds which have been reduced to judgment or which were committed by the bankrupt while acting as an officer or in a fiduciary capacity."

We respectfully submit that section 17 does not except *claims for frauds* which have been reduced to judgment, but does except "*judgments in actions for frauds*," which judgments, as well as judgments in actions in assumpsit, are made provable under section 63*a*(1), while "claims for fraud" are not provable under that section.

As judgments in actions for frauds were made provable they were excepted from the operation of a discharge. How can it be said that the provable character of claims for fraud in general is recognized by excepting from a discharge *judgments* in actions for fraud, such judgments being provable debts?

The "certain frauds" which the court holds are excepted from the operation of a discharge are frauds committed by the bankrupt "while acting as an officer or in any fiduciary capacity." The court also holds that debts created by fraud so committed are provable debts.

If the term fraud in subdivision 4 of section 17 is to be limited to fraud committed by the bankrupt while acting in an official or fiduciary capacity, and if debts created by fraud of that character are to be regarded as provable, then, according to the ruling of the court, section 17 excepts from the operation of a discharge only *provable debts*.

It can hardly be said that the provable character of claims for damages on account of fraud and on account of willful and malicious injuries to reversionary interests in property is recognized in section 17 by excepting from the effect of a discharge only certain *provable debts*, among which are official or fiduciary debts created by fraud.

By limiting the operation of a discharge to provable debts

section 17 recognizes a class of claims that are *not* provable. Belonging to that class are the plaintiff's claims for damages in this case.

It is said in the opinion:

"Certainly paragraph *b* does not embrace debts of an unliquidated character and which, in their nature, are not susceptible of being liquidated."

We respectfully ask, Can there be such a thing as a "debt" which, in its nature, is not susceptible of being liquidated? Does not the term "debt" imply a legal obligation? Are not all *debts* susceptible of liquidation by judgment or in some other manner?

If claims for fraud in general are not excepted from the operation of a discharge, it may be fairly inferred that they would have been excepted had they been provable.

The court asks:

"If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the operation of a discharge?"

Our contention is that all claims for damages on account of positive fraud are excepted from the operation of a discharge, either under the express provision of section 17 or because they are not provable debts.

Assuming, however, for the purpose of argument that only debts created by certain frauds are excepted from the effect of a discharge under section 17, and that such debts are provable, let us see what inferences may be drawn from that fact as to the provable character of claims for damages arising from frauds.

If, under the act of 1898, debts created by fraud are limited to official or fiduciary debts and such debts are provable, then the fact that they are provable would of itself be sufficient reason for excepting them specifically from the operation of a discharge.

Under the act of 1867 a *debt* created by fraud was made provable by the express provision of the act (section 33; Revised Statutes, section 5117), but the debt so created was excepted from the operation of a discharge.

Under the same act this court distinguished a *claim for damages* arising out of deceit or fraud from a "*debt* created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character," and held that such *claims for damages* were not provable (Strang *v.* Bradner, 114 U. S., 555).

Why should not claims for damages arising out of deceit or fraud be distinguished from debts created by fraud, and held not provable, under the act of 1898 as well as under the act of 1867?

If, under the act of 1898, claims for damages arising out of deceit or fraud are not expressly excepted from the operation of a discharge, the reason therefor may be found in the fact that such claims are not provable.

Judgments in actions for willful and malicious injuries to the person or property of another are excepted from the operation of a discharge, but there is no provision excepting specifically claims for damages arising from such injuries, and yet a bankrupt is not released from claims of that character, for the reason that such claims are not provable under the provision of section 63*a*.

Is any debt or claim provable which is not included in the classes of debts which are made provable under paragraph *a* of section 63?

We contend:

That paragraph *a* classifies and defines all claims or "debts which may be proved," while paragraph *b* provides for the liquidation of such unliquidated claims only as are embraced within the provisions of paragraph *a*, and thereafter for the proof and allowance of such claims.

Our contention with reference to "debts which may be proved" is fully supported by the authorities cited in plain-

tiff's brief (pages 8-24) to which we respectfully refer the court.

In language clear and explicit Congress took the pains to specify and define in paragraph *a* the "debts which may be proved."

It is manifest that Congress intended to specify in paragraph *a all provable debts*. The fact that in no other section of the statute is a "provable debt" defined makes it quite clear that Congress intended to make provable only the debts mentioned in paragraph *a*.

In Dunbar *v.* Dunbar, 190 U. S., 340, Mr. Justice Peckham, delivering the opinion of the court, said:

"In section 63*b*, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against the estate. *This paragraph b, however, adds nothing to the class of debts which may be proved under paragraph a of the same section. Its purpose is to permit an unliquidated claim coming within the provisions of section* 63*a, to be liquidated as the court should direct.*"

In the opinion in this case it is said that in section 17 "the provable character of claims for fraud in general is recognized."

But the court also says:

"*It certainly could not have been the intention of Congress to extend the operation of the discharge under section* 17 *to debts that were not provable under section* 63*a.*"

It follows, then, that a bankrupt is not released from a debt or claim which is not provable under paragraph *a* of section 63, and that section 17 adds nothing to the class of debts which may be proved under that paragraph.

Our contention is that claims for unliquidated damages arising from or created by positive fraud or by willful and malicious injuries to reversionary interests in property are

not included in any of the classes of debts specified in paragraph *a*.

We respectfully submit that the plaintiff's claims in this action cannot be regarded as provable without adding to the classes of debts mentioned in section 63*a* a class of claims of an entirely different character from those specified in that section, and no inference that may be legitimately drawn from section 17 would justify the making of such an addition. If such an addition were to be made by the court would it not be judicial legislation instead of judicial interpretation?

The plaintiff's claims for damages for fraud and for willful and malicious injuries to his reversionary interests in property are excepted from the operation of a discharge in bankruptcy.

The main reason given by the court for holding that debts created by fraud in general are not excepted from the operation of a discharge is stated in the opinion, as follows:

"The fact that the second subdivision of section 17 excepted from the discharge 'all judgments in actions for fraud, or of obtaining property by false pretences, or false representations,' indicates quite clearly that as to frauds in general it was the intention of Congress only to except from the discharge such as had been reduced to judgment, unless they fall within the fourth subdivision of those created by the fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in a fiduciary capacity.

"Unless these words relate back to all the preceding words of the subdivision, namely, the frauds and embezzlements as well as misappropriations or defalcations, it results that the exception in subdivision 2 of all judgments for fraud is meaningless, since such judgments would be based upon a fraud excepted from discharge by subdivision 4, whether judgment had been obtained or not."

We respectfully submit that the purpose of Congress in providing that a discharge should not operate upon "*judgments* in actions for frauds," etc., was to settle a question upon which there had been conflicting decisions.

In some jurisdictions the courts held that after a debt or claim for fraud or other tort had been merged in *judgment* it became not only provable but also a debt of record, and, as such, came within the operation of a discharge.

Wolcott *v.* Hodge, 81 Mass., 547; Ellis *v.* Hays, 28 Me., 385; Crouch *v.* Gridley, 6 Hill, 250; Kellogg *v.* Schuyler, 2 Denio, 73; Blake *v.* Bigelow, 5 Ga., 437; Comstock *v.* Grout, 17 Vt., 512; *In re* Adson Comstock, 22 Vt., 642; Manning *v.* Keyes, 9 R. I., 224; *In re* Wiggers, 2 Biss., 71; *In re* Samuel Hook, 3 McLean, 317; Hays *v.* Ford, 55 Ind., 52.

As this was contrary to its intention, Congress provided by subdivision 2 of section 17 that the bankrupt should not be released from such judgments. This, we respectfully submit, satisfactorily explains why subdivision 2 is found in section 17.

Referring to subdivision 2, the supreme court of Illinois said, in the opinion in this case:

"Such judgments were doubtless excepted to avoid the otherwise reasonable construction that as judgments, like other judgments, merging the cause of action, they would come within the operation of the discharge in bankruptcy."

In the case of Frey *v.* Torrey, 73 N. Y. Supp., 201 (decided at appellate terms), it is said:

"Under the act of 1867, doubts arose whether a judgment for fraud by merger of the original debt did not make the bankrupt's discharge operative upon the debt (*In re* Lewensohn, *supra*). Apparently, to dispel such doubts, subdivision 2 of section 17 of the present statute was enacted providing that the bankrupt's discharge shall not release him from provable debts which are 'judgments in actions for frauds,

or obtaining property by false pretences or false representations, or for willful and malicious injuries to the person or property of another.'"

In the same case, 75 N. Y. Supp., 40 (appellate division), the court said:

"There appears to have been some doubt whether such judgments would remain enforceable, and in view of the fact that Congress provides in subdivisions 1 and 5 of section 63 for proving judgments as debts, this subdivision was doubtless enacted to obviate such question, as well as to provide for cases, as has been seen, that were neither covered by the former law nor included in subdivision 4 of the present act (*In re* Lewensohn, 3 Am. Bankr. R., 594–596; Coll. Bank., 3d ed., p. 194)."

In re Wollock, 120 Fed. R., 516, it is said:

"It is inconceivable that Congress intended to enact by section 17, that no claim however tainted by fraud, even to the extent of *theft* or *robbery*, should be excepted from the effect of a discharge in bankruptcy unless reduced to the form of a judgment."

As said in Collier on Bankruptcy (1st ed.), 345:

"We think it will be conceded that there is in principle no more reason for releasing a tort-feasor from the amount due to another as damages, when it has been liquidated by some special mode of assessment, than when it has been liquidated by a judgment. The reason for making a discharge in bankruptcy no release of a judgment in an action for any of the torts mentioned in section 17 (2) is because of *the nature of the debt*, because of the *element of wrong* existing in it—and not because the claim has been put into the form of a judgment."

It is difficult for any one to conceive why a bankrupt should be released from a *claim* for fraud and not from a *judgment* for fraud.

To the courts which have overlooked the true reason for the enactment subdivision 2 has been a puzzle and has

given rise to a variety of theories and conjectures, most of which border on the fanciful.

Congress had precisely the same reasons for excepting from the operation of a discharge judgments in actions for frauds that it had for excepting judgments in actions for willful and malicious injuries to the property or person of another. If an injured party sustained damages by reason of libel, slander, assault and battery, *criminal conversation*, or malicious destruction of his property, it could hardly be said that Congress provided for the release of the bankrupt tort-feasor from all claims for damages unless such claims were merged in judgment, in order that the injured party might not be tempted to bring an action in *tort* rather than action in *assumpsit*.

Our views as to the reasons why subdivision 2 was incorporated in section 17 are confirmed by the subsequent action of Congress. The provision was enacted for the purpose of settling the question whether a judgment in an action in tort was barred by a discharge. While subdivision 2 settled one question, it gave rise to another. With that question we are confronted in this case. The question is this: By the enactment of subdivision 2 did Congress intend to release a bankrupt from all debts or claims for fraud unless they had been reduced to judgment or were created by fraud committed by the bankrupt while he was acting as an officer or in a fiduciary capacity?

When Congress found that its purpose in enacting subdivision 2 had been misunderstood by some of the courts, it proceeded, in February, 1903, to amend the subdivision by substituting the following:

(2.) "Are *liabilities* for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another, or for alimony due or to become due or for maintenance or support of wife or child, or for seduction of an unmarried female or for criminal conversation."

The above amendment throws light upon the original enactment, and shows clearly that it was not the intention of Congress to have subdivision 2 given a construction which would result in the release of a bankrupt from a claim for deceit, unless the claim had been reduced to judgment or fell within subdivision 4.

In Neal *v.* Clark, 95 U. S., 70, this court, speaking through Mr. Justice Harlan, said:

"This case involves the meaning of the word 'fraud' as used in the thirty-third section of the bankruptcy law of 1867. * * * This court in Chapman *v.* Forsyth, 2 How., 202, said: 'The cases enumerated, "the defalcation of a public officer," "executor," "administrator," "guardian" or "trustee" are not cases of implied, but special trusts, and the "other fiduciary capacity" mentioned must mean the same class of trusts.'

"A like process of reasoning may be properly employed in construing the corresponding section of the act of 1867. It is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows.' So, also, the meaning of a word may be ascertained by reference to the meaning of words associated with it. * * * In Brown's Legal Maxims, n. 450, it is said: 'The coupling of words together shows that they are to be understood in the same sense and when the meaning of any particular word is doubtful or obscure, * * * the intention of the party who has made use of it may frequently be ascertained and carried into effect by looking at the adjoining words.' The same author says (p. 455): In the construction of statutes, likewise, the rule *noscitur a sociis* is very frequently applied; the meaning of a word, and, consequently, the intention of the legislature, being ascertained by reference to the contexts, and by considering whether the word in question and the surrounding words are, in fact, *ejusdem generis*, and referable to the same subject-matter."

Applying these rules to this case, we remark that, in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge

in bankruptcy, debts created by "fraud" are associated directly with debts created by "embezzlement." Such association justifies, if it does not imperatively require, the conclusion that the "fraud" referred to in that section means positive fraud or fraud in fact involving moral turpitude.

Referring to section 33 of the act of 1867 (Revised Statutes, 5117), it is said in the opinion in this case:

"The language of this section is so clear as to require no construction. It is plain and explicit to the effect that the fraud and embezzlement of the bankrupt need not have been committed by him while acting as an officer or in any fiduciary character, and that this character relates only to his defalcation. But under the act of 1898, there is no such severance in the fourth paragraph as would authorize us to say that the term 'fiduciary capacity' did not extend back to the words 'fraud, embezzlement, and misappropriation.'"

As the court holds that the words "fraud," "embezzlement," and "misappropriation" are associated directly with the word "defalcation," and that the qualifying phrase "while acting as an officer or in any fiduciary capacity" relates back to all the preceding words of the subdivision, and applies equally to all, then this court, adopting the process of reasoning which it has hitherto uniformly followed, must hold that the term "defalcation," owing to its association with the terms "fraud" and "embezzlement," means a *fraudulent* defalcation, and that all official or fiduciary debts arising from defalcation would be barred by a discharge, unless the defalcation is a *fraudulent one, involving moral turpitude.*

If, as the court says, "the intent of Congress in changing the language of the act of 1867 seems to have been to restore the act of 1841" with the addition mentioned, it hardly accomplished its purpose, if a mere change in the collocation of words for the sake of brevity requires the court to give to subdivision 4 of section 17 of the act of 1898 a construction WHICH WOULD ENTITLE A BANKRUPT TO A RE-

LEASE FROM HIS OFFICIAL OR FIDUCIARY DEBTS UNLESS SUCH DEBTS WERE CREATED BY FRAUD AND INVOLVING MORAL TURPITUDE.

Under the ruling of the court, an administrator, executor, guardian, or technical trustee might become a defaulter, and, when sued for the amount of his defalcation, go into bankruptcy, obtain his discharge, and successfully plead it as a defense, unless it could be shown that the defalcation involved actual, positive fraud.

Under the ruling of the court in this case, an embezzler who was not an officer or a technical trustee may, under the provisions of the bankrupt law, secure a release from all debts or claims arising from his embezzlement unless the debts or claims were merged in judgment before he filed his petition in bankruptcy and obtained a stay of proceedings under section 11*a*.

We respectfully submit that, in view of the results which will follow from the construction given by the court to subdivision 4 of section 17, the court will, upon further consideration of the subject, come to the conclusion that Congress intended subdivision 4 to be, in substance, a re-enactment of the analogous provision of the act of 1867, and that it should receive the same construction. Upon this point we respectfully refer the court to the authorities cited in plaintiff's brief under point VI, page 49.

It is an indisputable fact that the manifest trend of bankruptcy legislation had been to restrict rather than enlarge the effect of a discharge. It will be noticed that each successive bankruptcy act passed by Congress had increased the classes of debts which are excepted from the operation of a discharge.

If it was the intention of Congress to make such a radical change with reference to the operation of a discharge upon "debts created by fraud," it is fair to presume that it would have manifested that intention in some other way than by using in an abbreviated form, but arranged somewhat

differently, almost the identical language of a former statute which had a settled judicial construction. It is to be noted that in subdivision 4 the change is in the omission of "or" and "his" by way of ellipsis, and in the collocation of words rather than in the phraseology.

Referring to the Frey *v.* Torrey case, the court says:

"But so far as we know this is the only case that supports the construction given by the supreme court of Illinois."

We respectfully say that the court must have overlooked the cases cited in the plaintiff's brief under point VII, page 55.

Under the same point the cases cited in the opinion in this case are reviewed. We respectfully refer the court to what was said in reviewing those cases. We wish, however, to make one correction. The plaintiff said in his brief:

"If a 'decision' imports a judicial determination of a question which is involved in the suit, then we say, counsel have not cited a single 'decision' of a Federal court which 'supports their views.' The reason why they have not is simple. There were none to cite. We say this after having made a thorough examination of the Federal decisions rendered since the passage of the bankruptcy act of 1898 to the present time. Counsel cite two Federal cases (*In re* Rhutassel, *supra*, and *In re* Hirschman, *supra*), in which the dicta therein favor their construction; and they cite only one case decided in the State courts (Morse *v.* Kaufman, *supra*), which supports their views and in which the determination of the question we are now considering was necessary to the decision."

The plaintiff inadvertently omitted to say that Smith & Wallace *v.* Lambert (69 N. J. Law, 487), as well as Morse *v.* Kaufman (100 Va., 218) supported opposing counsel's views.

Respectfully submitted.

MARTIN CLARK,
C. J. WILLETT,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1904.

RICHARD C. CRAWFORD and EDWARD A. VALENTINE,
Plaintiffs in Error,
vs.
JOHN E. BURKE, *Defendant in Error.*
} No. 22.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

CERTIFICATE OF COUNSEL.

We, the undersigned counsel for said John E. Burke, defendant in error, do hereby certify that in our opinion there is just ground in point of law for the allowance of a rehearing in said cause.

MARTIN CLARK,
C. J. WILLETT,
Counsel for Defendant in Error.